Supreme Court, U.S.
FILED

No. 971582 MAR 2 0 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

GENERAL DYNAMICS CORPORATION,

Cross-Petitioner,

vs.

MANUEL BURGO, JR.,

Cross-Respondent.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the District Director's Supplemental Order issued November 17, 1994 and Denial of Motion for Reconsideration issued December 5, 1994 in accordance with law when he held the limitation period in 33 U.S.C. § 914(f) to be ten calendar days rather than properly calculated under Fed. R. Civ. P. 6(a) and Notice 42.

RULE 29.6 STATEMENT

Electric Boat Corporation (formerly General Dynamics Corporation, Electric Boat Division) is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Corporation is the publicly traded parent corporation. Electric Boat Corporation does not issue shares to the public.

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APPENDIX

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General Dynamics Corporation (Electric Boat Corporation) respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Burgo v. General Dynamics Corporation*, 122 F.3d 140 (2nd Cir. 1997), *rehearing denied*, (November 17, 1997).

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit in *Burgo v. General Dynamics Corporation*, 122 F.3d 140 (2nd Cir. 1997), *rehearing denied*, (November 17, 1997) is reproduced in the Petitioner's Appendix pp. 27a-41a.

STATEMENT OF JURISDICTION

The ruling of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the District of Connecticut was entered on August 27, 1997. The court awarded penalty payment under 33 U.S.C. § 914(f) but denied Petitioner's request for interest, expenses and attorney's fees. Jurisdiction was in accordance with 33 U.S.C. § 918(a). The Petitioner filed a timely petition for rehearing. The Respondent filed a timely petition for rehearing. An order denying both petitions for rehearing was entered November 17, 1997. Petitioner's petition for writ of certiorari was docketed on February 18, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditioned upon the Court's grant of Petitioner's petition for a writ of certiorari.

STATUTES AND RULE INVOLVED

33 U.S.C. § 914(f) provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in Section 21 and an order staying payments has been issued by the Board or court.

33 U.S.C. § 918(a) provides in pertinent part:

> In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in Section 19, a deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. . . . Such supplementary

order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. . . . No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. . . .

33 U.S.C. § 928(a) provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of this claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. § 928(d) provides in pertinent part:

The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for

witnesses shall not in any respect affect or diminish the compensation payable under this Act.

Federal Rule of Civil Procedure 6(a) in part:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

STATEMENT OF THE CASE

The respondent, General Dynamics Corporation, adopts the statement of the case contained in the Petitioner's petition for a writ of certiorari docketed February 18, 1998.

REASONS FOR GRANTING THE WRIT

Should this Court grant the petition for writ of certiorari in this case, it will be called upon to review whether Petitioner should be entitled to attorney's fees, expenses and interest in collecting penalty payments under 33 U.S.C. § 914(f). Any

such decision rests necessarily on the conclusion that the Petitioner, Manuel Burgo, is entitled to penalty payments under 33 U.S.C. § 914(f) specifically if the receipt of the payment to satisfy an ALJ Order was received within the time limitation of 33 U.S.C. § 914(f).

Respondent has contended throughout this proceeding that its payment was received by the Petitioner within the ten (10) day period of 33 U.S.C. § 914(f) as properly computed under Fed. R. Civ. P. 6(a) to exclude intervening Saturdays, Sundays and legal holidays for periods less than 11 days. Respondent relies on the decision in *Quave v. Progress Marine*, 721 F. Supp. 784 (D.C. La. 1989), *aff'd*, 912 F.2d 798 (5th Cir. 1990), *cert. denied*, 500 U.S. 916, 111 S. Ct. 2012 (1991) and the Notice 42 of the United States Department of Labor OWCP dated June 9, 1980. Petitioner relies on the decision in *Reid v. Universal Marine Terminal Corp.*, 41 F.3d 200 (4th Cir. 1994) that the ten day period is ten calendar days without reference to Fed R. Cir. P. 6(a). The Second Circuit in this case has also adopted the interpretation of 33 U.S.C. § 914(f) that it is ten calendar days. The Longshore and Harbor Workers' Act 33 U.S.C. § 901, *et seq.* does not contain any method of calculating periods of limitation.

The decision of the United States Court of Appeals for the Second Circuit is in conflict with the decision of another United States Court of Appeals in the same important matter. The interpretation of the correct way to calculate the period of limitation under 33 U.S.C. § 914(f) is important because employers are liable for a 20% penalty if payments under the ALJ orders are late under the language of 33 U.S.C. § 914(f).

Clearly there is a conflict between three United States Courts of Appeals regarding the proper interpretation of 33 U.S.C. § 914(f) and Fed R. Civ. P. 6(a). If the Court grants the writ of

certiorari of the Petitioner regarding the issue of attorney's fees, expenses and interest, the Court must examine whether the underlying decision to award the Petitioner the 20% penalty under 33 U.S.C. § 914(f) was in accordance with the law.

CONCLUSION

Should this Court grant the petition for writ of certiorari, the underlying issue of whether the underlying decision to award the Petitioner the 20% penalty under 33 U.S.C. § 914(f) was in accordance with the law would necessarily require examination by this court.

For this reason, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — UNITED STATES DEPARTMENT OF LABOR OWCP NOTICE 42 DATED JUNE 9, 1980

Benefits Review Board Service

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

Washington D.C. 20210

June 9, 1980

No. 42

NOTICE TO INSURANCE CARRIERS AND SELF-INSURED EMPLOYERS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Subject: Penalty Provisions of Section 14(f) of the Longshoremen's and Harbor Workers' Compensation Act

This notice is to inform interested parties of the policy of the Office of Workers' Compensation Programs (OWCP) with respect to assessing penalties against self-insured employers/carriers as provided by Section 14(f) of the Longshoremen's and Harbor Workers' Compensation act (LHWCA).

Section 14(f) of the LHWCA provides that if compensation payable under the terms of an award is not paid within 10 days after it becomes due, absent the initiation of review proceedings

and the issuance of a stay of payments order, then an additional twenty percent of the past due compensation is also payable.

Payment becomes due when the Order is filed in the Office of the Deputy Commissioner. No distinction is made between an award evolved by agreement of the parties such as an agreed settlement of an award resulting from a hearing.

No distinction is made between payment by check or by draft. If the check or draft is honored by the bank on which drawn, the time of payment relates back to the date the check or draft is received by the payee. If the check or draft is not promptly honored by the drawee bank, payment is not considered to have been made until the check or draft is honored.

If the tenth day is a Saturday, Sunday or legal holiday, compensation is due on the first business day following that date. This is in accordance with Rule 6(a) of the Federal Rules of Civil Procedure.

s/ Neil A. Montone
NEIL A. MONTONE
Associate Director,
Longshore and Harbor
Workers' Compensation

APPENDIX B — LETTER FROM MARCIA D. FINN, ACTING DISTRICT DIRECTOR/LHWCA DATED MAY 14, 1997

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
JFK Federal Building, Room E-260
Boston, MA 02203

File Number:

May 14, 1997

To Whom It May Concern:

OWCP Notice No. 42, *Penalty Provisions of Section 14(f) of the Longshore and Harbor Workers' Compensation Act,* as it appears in the 10/96 revised Benefits Review Board Service is currently in effect.

s/ Marcia D. Finn
Marcia D. Finn
Acting District Director/LHWCA